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No. 77-115

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

WESTERN UNION INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORAMDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

In this case a divided court of appeals vacated and set aside (Pet. App. A) the order of the Federal Communications Commission in *The Western Union Telegraph Co.*, 55 FCC 2d 668 (Pet. App. D). The Commission had ruled that Section 222 of the Communications Act of 1934, 57 Stat. 5, as added and amended, 47 U.S.C. 222, did not prohibit petitioner ("Western Union") from leasing and operating facilities to extend Mailgram[1] service between the mainland of the United States and Hawaii.

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[1] "*Mailgram*" is a service whereby subscribers' messages are computer-routed by Western Union, over circuits specifically dedicated to Mailgram service, to pre-selected Post Office locations throughout the country. Postal employees take the messages off teleprinters and mail them to the addressees so that they are usually received by the next working day.

Section 222 was added to the Communications Act in 1943 to authorize the merger into Western Union of the Postal Telegraph Cable Co. Because Western Union had extensive international operations, Congress was concerned that the domestic monopoly resulting from the merger, through coordination of its domestic operations with its international operations, might cause unfair competitive injury to other international carriers (Pet. App. A-8). To forestall this development, Congress provided in Section 222(c)(2) that Western Union would have to divest itself of its international operations.[2] The merger was consummated, Western Union acquired a domestic monopoly, and in 1963 the required divestiture of its international services was completed (Pet. App. A-7).

Under Section 222 as enacted in 1943, Hawaii was not included in the definition of the domestic service area to be served by the merged company because it was not one of the States of the Union. Section 222(a)(5)(10). It was therefore an international point for record message service. When Hawaii was admitted to statehood, Congress amended the definition of domestic service so as to continue the treatment of Hawaii as an international point. Hawaii Omnibus Act, Section 36, 74 Stat. 411, 421.

In 1972 Western Union applied to the Commission under 47 U.S.C. 214 for authority to furnish Mailgram service to Hawaii. The Commission's Common Carrier

[2]Section 222(c)(2) provides:

> Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission * * *.

Bureau rejected the application (Pet. App. D-2). On review, the Commission granted it, holding that the Section 222(c)(2) requirement of divestiture of Western Union's international operations did not "impose upon WU an all-encompassing bar to future international or overseas operations" (Pet. App. D-20). The court of appeals rejected this holding, concluding from its examination of the legislative history and the Commission's prior decisions that Section 222(c)(2)'s divestment directive "was meant as a continuing bar to WU's involvement in international record communications, which would include Mailgrams" (Pet. App. A-14).

Because Congress is actively considering legislation which would moot this case by authorizing Western Union to provide service to Hawaii, review by this Court of the court of appeals' construction of Section 222(c)(2) is unwarranted.

On August 5, 1977, the Senate passed S. 1866, 95th Cong., 1st Sess., which would amend Section 222 to include Hawaii in the same category as other states. 135 Cong. Rec. S 13859 (daily ed., August 5, 1977). See S. Rep. No. 95-389, 95th Cong., 1st Sess. (1977). For the reasons set forth in its decision (Pet. App. D), and Judge Mansfield's dissenting opinion (Pet. App. A-15—A-21), the Commission believes that the decision of the court below is erroneous, and it would so contend if this Court were to grant